Supreme Court, U.S.
FILED
JUL 13 1992
OFFICE OF THE CLERK

No. 91-1899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTOPHER C. DAY, PH.D.,

Petitioner,

– against –

JOHN W. MOSCOW; JOSEPH B. MURRAY, Individually and as Senior Court Officer of the State of New York; "JANE DOE" MARSHALL, Individually and as Captain of the New York City Department of Correction; JOHN DOE, 1-10, Unknown named Officers of the New York City Police Department and the New York City Department of Correction,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF IN REPLY

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Petitioner

- against -

JOHN W. MOSCOW, et al.,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Christopher C. Day, Ph. D., (DAY) submits the following Brief in support of his Petition for Certiorari to this Court from the judgment of the United States Court of Appeals for the Second Circuit, entered January 24, 1992.

I. THE ACCRUAL OF CLAIMS IN IN 1983 ACTIONS IS PART OF THE STATE'S CONSIDERED LIMITATIONS POLICY AND SHOULD BE APPLIED

This Court is asked in this case to construe the meaning of "accrual" in Section 1983 actions. The Court below applied a unitary general federal rule of accrual.

A natural interpretation would suggest we turn to state law to construe the term, as Section 1988 requires that we borrow state statutes of limitations as well as coordinate tolling rules and rules of application. Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1038, 85 L. Ed. 2d 254 (1985). Johnson v. Railway Express Agency, 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975), passim, at 463 (see also, Board of Regents v. Tomanio, 446 U. S. 478, 100 S. Ct. 1890, 64 L. Ed. 2d 440

(1980), at 488). The purpose of Section 1988 in so requiring is deference to the state's "wisdom in setting a limit" as part of a "complete limitations policy." Board of Regents, supra, at 488. Instead, the Court below turned to a "federal rule of accrual" for actions generally. (A-40).

The fallacy of this approach is shown by reference to this Court's decisions rejecting just such a unitary approach to the meaning of the term "accrual".

> The Court has pointed out before [...] the hazards inherent in attempting for all purposes when a "cause of action" first "accrues."

Crown Coat Front Co. v. United States, 386 U.S. 503, 517, 87 S. Ct. 1177, 18 L. Ed. 2d 256 (1967).

Previously, in Reading Co. v. Koons, this Court had affirmatively stated:

> We do not think it possible to assign to the word "accrue" any

> definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or another.

Id, 271 U.S. 58, 61-62, 46 S. Ct. 405, 70 L. Ed. 835 (1926).

Cases under one statute do not govern cases under another. Compare, Crown Coat Front, at 517. This is especially so, given the nature of Section 1983 claims which are not unitary.

The proper question is, as the Fifth Circuit stated in Federal Reserve Bank v. Atlanta Trust Co., 91 F. 2d 283 (5th Cir., 1937), cert. den., 352 U.S. 738, 82 L. Ed. 58 S. Ct. 140, "in each case, therefore, where limitation is involved, the important, the controlling question is, what is the cause of action?" Id, at 286.

The federal courts have repeatedly turned to state law and borrowed the elements of state tort law to provide content

to the term "cause of action" under Section 1983. See, Wilson v. Garcia, supra, at 277.

This Court has thus, construed "accrual" to mean when the cause of action is "complete." Amy v. Dubuque, 98 U.S., 8 Otto, 470, 474, 25 L. Ed. 228 (1878)

If under Section 1988, federal courts borrow the elements of state law false arrest claims in analogous actions, and the state law of false arrest holds that the cause is not "complete and perfect" until the plaintiff is released, why should the state's scheme and clear intention in determining when such analogous claims begin to run be ignored in favor of a general federal rule, such as that proposed in the cases relied on here? (See, Bireline v. Seagondollar, 567 F. 2d 260, 263 (4th Cir., 1977) borrowing such a "rule" from other areas of federal law

(Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) (FELA).)

II. THE COURT OF APPEALS' UNPRECEDENTED EXTENSION OF THE DOCTRINE OF RES JUDICATA BARRED A CLAIM WHICH THE TRADITIONAL RULE WOULD HAVE ALLOWED

Respondents' arguments on the second question raised by Petitioner to this Court demonstrates the very reason why this Court should intervene.

Respondents argue that in Day I the Court of appeals "finally determined" that all the claims Petitioner could have asserted against Respondent Murray were "time-barred." However, a Section 1983 malicious prosecution claim would not have been time-barred. See, Conway v. Village of Mount Kisco, 750 F. 2d 205 (2d Cir., 1984), cert. dism. sub nom., Cerbone v. Conway, 479 U.S. 84 (1986).

In its decision in Day I, the Court of Appeals only addressed the timeliness of Plaintiff's "arrest/search claims" (A-22), the only issue raised by Murray, and denied leave to replead those.

Yet, Petitioner had stated a claim for malicious prosecution (A-16), and pled in his proposed amended complaint (Par. 9, 11, 13) (Appellant's Supplemental Appendix in 90-7040, 4-6) that Murray had not observed Petitioner at the place and time he was alleged to have trespassed, and "initiated the prosecution" "in conspiracy" with Respondent Moscow, and argued this to the Court of Appeals (Appellant's Brief, 90-7040, at 18-19).

In this case, Petitioner, a distinguished professor, author, civil rights advocate and court-watcher was arrested at the instance of district attorney, who stole his briefcase, and subjected him to

a six-month trespass prosecution, for simply being in the courthouse.

Applying the law of the case, rather than res judicata to the decision in Day I, reversing in part and affirming in part (see, Todd v. S.E.C., Inc., 637 F. 2d 154 (3d Cir., 1980); Cowgill v. Raymark Industries, Inc., 832 F. 2d 798 (3d Cir., 1987)), such a ruling that "all ... claims [arising from Day's arrest and prosecution] were time-barred" would be subject to revision as "clearly erroneous." Colt v. Christiansen Industries, 486 U.S. 800, 817 (1988), and Petitioner would be entitled to prosecute his malicious prosecution claim against Murray.

CONCLUSION

Therefore the petition for certiorari should be granted.

Dated: July 13, 1991
Brooklyn, New York

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